

1 LOUIS A. HIGHMAN, ESQ., State Bar No. 61703
2 LAWRENCE BALL, ESQ., State Bar No. 60496
3 HIGHMAN, HIGHMAN & BALL
4 A Professional Law Association
5 870 Market Street, Suite 467
6 San Francisco, CA 94102
7 Telephone: (415) 982-5563
8 Facsimile: (415) 982-5202

9 Attorneys for Plaintiff Arthur Mielke

10 United States District Court
11 Northern District of California
12 San Francisco Division

13 ARTHUR MIELKE,

No. C 04-05502 TEH

14 Plaintiff,

15 -v-

PLAINTIFF'S NOTICE OF
MOTION TO REMAND CASE
TO SUPERIOR COURT;
PLAINTIFF'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO
REMAND CASE TO SUPERIOR
COURT

16 CONOCOPHILLIPS
17 COMPANY, SENTINEL
18 TRANSPORTATION LLC,
19 ABE CASTRO, MARILYN
20 SHAW, DAVE STANNARD,
21 DOES I-XX,

DATE OF HEARING: 5-9-05
TIME: 10 A.M.
CTRM: 12
JUDGE: HON. THELTON
E. HENDERSON

22 Defendants.
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>PAGES</u>
1	
2	
3	NOTICE OF MOTION TO
4	REMAND.....1
5	MEMORANDUM OF POINTS AND
6	AUTHORITIES.....1
7	I. STATEMENT OF ISSUES.....1
8	II. STATEMENT OF FACTS.....2
9	III. ARGUMENT.....6
10	A. DEFENDANTS ABE CASTRO AND DAVE STANNARD
11	ARE NOT SHAM DEFENDANTS, AND DEFENDANTS
12	CANNOT MEET THEIR HEAVY BURDEN OF SHOWING
13	THAT PLAINTIFF WILL NOT BE ABLE TO ESTABLISH
14	A CAUSE OF ACTION AGAINST DEFENDANTS CASTRO
15	AND/OR STANNARD.....6
16	1. THERE IS, AT A MINIMUM, A POSSIBILITY THAT
17	DEFENDANT ABE CASTRO IS LIABLE ON THE FIRST
18	CAUSE OF ACTION FOR VIOLATION OF CALIFORNIA
19	GOVERNMENT CODE SECTOIN 12945.2 (CFRA) AND
20	CAL. ADMIN. CODE, TITLE 2, SECTION 7297.7 (AN
21	IMPLEMENTING ADMINISTRATIVE REGULATION
22	PERTAINING TO CFRA.....9
23	a. DEFENDANT ABE CASTRO IS NAMED AS A
24	DEFENDANT IN THE FIRST CAUSE OF ACTION.....9
25	b. DEFENDANT ABE CASTRO WAS SUFFICIENTLY
26	CITED IN THE ADMINISTRATIVE CHARGES FILED
27	WITH THE DEPARTMENT OF FAIR EMPLOYMENT
28	AND HOUSING TO MEET ANY ADMINISTRATIVE
	FILING REQUIREMENT.....9
	c. AN INDIVIDUAL SUPERVISORIAL/MANAGERIAL
	EMPLOYEE IS LIABLE AS AN INDIVIDUAL FOR
	DIRECT ACTS TAKEN BY HIM IN VIOLATION OF
	GOVERNMENT CODE SECTION 12945.2 (CFRA) AND
	CAL. ADMIN. CODE, TITLE 2, SECTION 7297.7
	(AN IMPLEMENTING ADMINISTRATIVE PROVISION
	OF CFRA.....11
	2. THERE IS ALSO, AT A MINIMUM, A POSSIBILITY
	THAT DEFENDANT DAVE STANNARD IS LIABLE
	ON THE SECOND CAUSE OF ACTION FOR
	DEFAMATION.....16
	i.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

a. THE DEFAMATORY STATEMENTS ARE NOT
TIME-BARRED.....18

b. THE DEFAMATORY STATEMENTS ARE NOT
OPINION, AND ACCORDINGLY ARE
ACTIONABLE.....20

IV. CONCLUSION.....23

TABLE OF AUTHORITIES

PAGES

CASES

<u>Agarwal v. Johnson</u>	23
21 Cal.3d 832 (1979).....	
<u>Coker v. Amoco Oil Co.</u>	16
709 F.2d 1433 (11th Cir. 1983).....	
<u>Darby v. Bratch</u>	14
287 F.3d 673 (8th Cir. 2002).....	
<u>Dodson v. Spiliada Maritime Corp.</u>	6, 15
951 F.2d 40 (5th Cir. 1992).....	
<u>Dudley v. Department of Transportation</u>	13
90 Cal.App.4th 255 (2001).....	
<u>Green v. Amerada Hess Corp.</u>	7, 8
707 F.2d 201, (5th Cir. 1983).....	
<u>Jensen v. Hewlett-Packard Company</u>	20, 21, 22
14 Cal.App.4th 958 (1993).....	
<u>Macey v. Allstate Prop. & Cas. Co.</u>	7
220 F.Supp.2d 1116 (N.D. California 2002).....	
<u>Manguso v. Oceanside Unified School District</u>	19
88 Cal.App.3d 725 (1979).....	
<u>Martin v. Fisher</u>	10
11 Cal.App.4th 118 (1992).....	
<u>McCabe v. Gen. Foods Corp.</u>	7
811 F.2d 1336 (9th Cir. 1987).....	
<u>Morrow v. Putnam</u>	14
142 F.Supp.2d 1271 (D. Nevada 2001).....	
<u>Page v. Superior Court</u>	14
31 Cal.App.4th 1206 (1995).....	
<u>Ritchey v. Upjohn Drug Co.</u>	7, 8
139 F.3d 1313 (9th Cir. 1998).....	
<u>Saavedra v. Orange County Consol. Transp.</u>	
<u>Serv. Agency,</u>	
11 Cal.App.4th 824.....	10
<u>Sessions v. Chrysler Corporation</u>	8
517 F.2d 759 (9th Cir. 1975).....	

NOTICE OF MOTION TO REMAND

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 9, 2005 in courtroom 12 on the 19th floor of the above-entitled Court, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, California, the Hon. Thelton E. Henderson presiding, plaintiff will move the above-entitled Court for an order remanding the above-entitled case to the Superior Court of California, County of Contra Costa. The motion will be made pursuant to 28 U.S.C. Section 1447 on grounds that the case should be remanded because the U.S. District Court has no subject matter jurisdiction over this case. The motion will be based on this notice of motion, the memorandum of points and authorities appearing below, the Declaration of Arthur Mielke in Support of Motion to Remand Case to Superior Court, and all papers on file herein.

DATED: April 4, 2005.

LOUIS A. HIGHMAN
LAWRENCE BALL
HIGHMAN, HIGHMAN & BALL

By /s/ Louis A. Highman
Attorneys for Plaintiff
ARTHUR MIELKE

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES

The issues to be decided in this motion to remand are:

1. Whether this Court should order this case remanded to the Superior Court of California, County of Contra Costa.

1 2. Whether this Court has subject matter jurisdiction
2 of this case, based on defendants' claim made in their notice
3 of removal that there is allegedly diversity of citizenship in
4 the case, under 28 U.S.C. Section 1332.

5 3. Whether defendants Abe Castro and Dave Stannard were
6 fraudulently joined as defendants and are sham defendants
7 (since if the answer is no, then there is not diversity
8 jurisdiction in this case).

9 **II. STATEMENT OF FACTS**

10 Plaintiff filed a complaint in Superior Court of the
11 State of California for the County of Contra Costa against
12 defendants ConocoPhillips Company, Sentinel Transportation
13 LLC, Abe Castro, Marilyn Shaw, Dave Stannard, and Does I-XX,
14 Case No. CO 4-02148 on November 19, 2004. (Ex. A to Def.
15 Notice of Removal.)

16 In the state court complaint, plaintiff alleged that
17 both he and defendants Abe Castro and Dave Stannard were
18 residents of California, a fact not disputed by defendants.
19 (See Notice of Removal, 2:9-10; 2:22-26.) Defendants
20 ConocoPhillips Company, Sentinel Transportation LLC, and
21 Marilyn Shaw are not residents of California. The claims
22 brought in the state court complaint were all state law
23 claims. There were no violations of federal law alleged in
24 the complaint, and no federal questions presented in the
25 complaint. (See state court complaint, attached to Def.
26 Notice of Removal as Ex. A.) The complaint alleged causes of
27 action for (a) violation of the California Fair Employment and
28

1 Housing Act, including violation of Government Code Section
2 12945.2 (the California Family Rights Act [CFRA]) and
3 violation of Cal. Admin. Code, Title 2, Section 7297.7 (an
4 implementing administrative regulation of CFRA), as well as
5 California Government Code Section 12940(i); (b) defamation;
6 and (c) wrongful tortious adverse personnel actions (including
7 wrongful discharge) against public policy. The two individual
8 defendants (both indisputably California residents) which were
9 focused on in the notice of removal filed by defendants as
10 being allegedly sham defendants were defendant Abe Castro (who
11 was named as a defendant individually liable as to the first
12 cause of action--violation of the California Fair Employment
13 and Housing Act, including CFRA), and defendant Dave Stannard
14 (who was named as a defendant individually liable as to the
15 second cause of action--defamation).

16 In the state court complaint, plaintiff, a driver of
17 gasoline tanker trucks, alleged that when defendant Sentinel
18 Transportation LLC took over truck driving operations out of
19 the Richmond Terminal and other ConocoPhillips Company
20 terminals, operating the ConocoPhillips Company West Coast
21 gasoline transportation fleet, it did not retain him or hire
22 him as a driver despite his good standing and excellent
23 performance and safety record in driving out of the Richmond
24 Terminal for ConocoPhillips Company. Plaintiff further
25 alleged that a motivating factor in not selecting him to be
26 retained in conjunction with the takeover (and effectively
27 discharging him thereby), and then later not selecting him

28

1 again after the takeover, was that he was out on a medical
2 leave covered by the California Family Rights Act at the time
3 of selection (CFRA) and that he was also not selected and
4 effectively discharged because he had protested various safety
5 issues pertaining to the driving of these hazardous gasoline
6 tanker trucks. He alleged further that defendants Abe Castro
7 (a California resident) and Marilyn Shaw (a non-California
8 resident) were decision-makers in not selecting him and
9 effectively discharging him in retaliation for his exercising
10 his CFRA right to take a protected medical leave. (See state
11 court complaint, Ex. A to def. notice of removal, paragraphs
12 1-37, 56-57.)

13 Plaintiff also alleged in the state court complaint that
14 he was defamed by Dave Stannard (his supervisor at
15 ConocoPhillips), including, without limitation, in that
16 defendant Stannard filled out in writing an "Employee
17 Selection and Hiring Worksheet", on plaintiff, and submitted
18 it to defendant Sentinel Transportation which in turn appears
19 to have been used in the decision on whether to let plaintiff
20 continue to work as a truck driver after Sentinel would become
21 the official employer. (See state complaint, Exhibit A to
22 def. notice of removal, paragraphs 42-54.)

23 Defendants removed the complaint in timely fashion to
24 federal court based on an allegation that the Court allegedly
25 has original jurisdiction of this case based on there
26 allegedly being diversity of citizenship in the case (28
27 U.S.C. Section 1332). Defendants' view that there is diversity
28

1 jurisdiction in this case is based on their view that
2 defendants Abe Castro and Dave Stannard were fraudulently
3 joined as defendants. Since both Castro and Stannard were
4 indisputably California residents at the time of the filing of
5 the complaint, as was plaintiff Mielke, there could be no
6 diversity jurisdiction of this Court unless both Castro and
7 Stannard were fraudulently joined and are sham defendants.

8 Within 30 days after defendants received the complaint,
9 they filed a notice of removal.

10 Defendants have removed this case to federal court based
11 on an allegation that there is diversity jurisdiction in this
12 case, based on their view that defendants Abe Castro and Dave
13 Stannard (although admittedly residents of the State of
14 California at the time of the filing and service of the state
15 court complaint) are sham defendants, and should accordingly
16 be ignored in determining whether there is diversity
17 jurisdiction. The Notice of Removal was filed on or about
18 December 29, 2004.

19 Plaintiff brings this motion to remand on grounds that
20 this Court does not have original jurisdiction under this case
21 pursuant to 28 U.S.C. Section 1332, because there is no
22 diversity jurisdiction. Defendants would have to show that
23 **both** defendants Castro and Stannard were fraudulently joined
24 and are sham defendants, when in fact neither are. The burden
25 is on defendants and they cannot show that there is absolutely
26 no possibility that plaintiff will not be able to establish a
27 cause of action against defendant Castro as an individual for
28

1 violation of California Government Code Section 12945.2 (first
2 cause of action), and/or against defendant Stannard as an
3 individual for defamation (second cause of action), or that
4 there has been any fraud in the plaintiff's pleadings of
5 jurisdictional facts.

6 **III. ARGUMENT**

7 **A. DEFENDANTS ABE CASTRO AND DAVE STANNARD ARE NOT SHAM**
8 **DEFENDANTS, AND DEFENDANTS CANNOT MEET THEIR HEAVY**
9 **BURDEN OF SHOWING THAT PLAINTIFF WILL NOT BE ABLE TO**
10 **ESTABLISH A CAUSE OF ACTION AGAINST DEFENDANTS CASTRO**
11 **AND/OR STANNARD**

12 Defendants have to show there has been a fraudulent
13 joinder of **both** defendant Abe Castro and defendant Dave
14 Stannard in this case. It is undisputed that plaintiff, and
15 both defendants Castro and Stannard are California residents,
16 and even one California resident named properly as a defendant
17 would defeat diversity jurisdiction (which was the basis for
18 removal put forward by defendants in their notice of removal).

19 The issue in determining whether there has been a
20 fraudulent joinder of a defendant is, whether construing all
21 disputed issues of fact in favor of plaintiff and all
22 ambiguities in California law in favor of plaintiff, there is
23 a possibility that plaintiff has at least one valid claim
24 against at least one of the defendants who are California
25 residents. If such a possibility exists, then the Court
26 should reject the fraudulent joinder argument made by
27 defendants and remand the case to state court. (See Dodson v.
28 Spiliada Maritime Corp. [5th Cir. 1992] 951 F.2d 40, 42-43,
51-[even 'tenuous proposition' under state law sufficient to

1 defeat allegation of fraudulent joinder; "We do not decide
2 whether the plaintiff will actually or even probably prevail
3 on the merits, but look only for a possibility that he may do
4 so."].

5 In Macey v. Allstate Prop. & Cas. Co. (N.D. California
6 2002) 220 F.Supp.2d 1116, 1117, the Court indicated that
7 defendants must bear the burden of proving all facts necessary
8 to support jurisdiction, and that, "[i]n order to prove
9 'fraudulent joinder,' the defendants must prove that plaintiff
10 'fails to state a cause of action against [the] resident
11 defendant, and the failure is obvious according to the settled
12 rules of the state.' Ritchey v. Upjohn Drug Co., 139 F.3d 1313
13 (9th Cir. 1998), citing McCabe v. Gen. Foods Corp., 811 F.2d
14 1336 (9th Cir. 1987)(emphasis added).) (Emphasis in original
15 of Macey decision.)

16 In Green v. Amerada Hess Corp. (5th Cir. 1983) 707 F.2d
17 201, 205, the Court stated, "The burden of proving a
18 fraudulent joinder is a heavy one. The removing party must
19 prove that there is absolutely no possibility that the
20 plaintiff will be able to establish a cause of action against
21 the in-state defendant in state court, or that there has been
22 outright fraud in the plaintiff's pleadings of jurisdictional
23 facts." (Emphasis added.)

24 There is no issue presented as to the jurisdictional
25 facts in this case, as defendants concede that defendants
26 Castro and Stannard, as well as plaintiff Mielke, were
27 California residents at the time of the filing of the state
28

1 court complaint. Accordingly, the only issue is whether
2 defendants can prove that there is absolutely no possibility
3 that the plaintiff will be able to establish a cause of action
4 as to **both** defendants Castro and Stannard. Even if defendants
5 show that plaintiff does not have any possibility of
6 establishing a cause of action against one of the California
7 resident defendants but does have the possibility of
8 establishing a cause of action against the other, the motion
9 to remand should be granted since the possibility of
10 establishing a cause of action against only one of the two
11 California resident defendants would still be sufficient to
12 defeat diversity jurisdiction.

13 In determining whether a defendant's joinder is
14 "fraudulent", courts properly consider the allegations of the
15 complaint (as if they are facts), and facts presented by the
16 defendants in their notice of removal. (See Ritchey v. Upjohn
17 Drug Co. (9th Cir. 1998) 189 F.3d 1313, 1318; Sessions v.
18 Chrysler Corporation, 517 F.2d 759 (9th Cir. 1975).) Either
19 side can also present affidavits or other evidence on the
20 issue of whether a particular defendant's joinder is
21 "fraudulent" or "sham". (WestAmerica Corp. v. Vaughan Bassett
22 Furniture (9th Cir. 1985) 765 F.2d 932, 936, fn. 6.) However,
23 the Court does not pre-try substantive factual issues; the
24 only issue the court should address is its own jurisdiction.
25 (See Green v. Amerada Hess Corp. (5th Cir. 1983) 707 F.2d 201,
26 204.) See also, Sch/warzer, Tashima & Wagstaffe, Cal. Prac.
27 Guide: Fed.Civ. Pro. Before Trial, Rutter Group 2005,

1 Sections 2:680, 2:681, 2:682, 2:683, 2:684, 2:685, and 2:686.

2 1. There is, at a minimum, a possibility that defendant
3 Abe Castro is liable on the First Cause of Action for
4 violation of California Government Code Section 12945.2 (CFRA)
5 and Cal. Admin. Code, Title 2, Section 7297.7 (an implementing
6 administration regulation pertaining to CFRA)

7 a. Defendant Abe Castro is named as a defendant in the
8 first cause of action.

9 Defendants take the position in their notice of removal
10 that defendant Abe Castro is not named as a defendant
11 individually liable in the first cause of action in the state
12 court complaint. Through inadvertence, defendant Abe Castro
13 was not listed in the parentheses part under the First Cause
14 of Action (page 2, state court complaint, lines 2-10, Ex. A to
15 def. notice of removal). However, defendant Castro is clearly
16 and expressly named in the body of the First Cause of Action
17 as a named defendant alleged to be in violation of the First
18 Cause of Action. (See paragraphs 4, 17-20, 25, 31, and 36-41
19 of the state court complaint, Ex. A. to def. notice of
20 removal.) Thus, defendants' argument in this regard has no
21 merit.

22 b. Defendant Abe Castro was sufficiently cited in the
23 administrative charges filed with the Department of Fair
24 Employment and Housing to meet any administrative filing
25 requirement.

26 Defendant Marilyn Shaw indicated in her declaration
27 supporting notice of removal of the action that she had not
28

1 received any documents "reflecting charges against Abe Castro.
2 . .". (See Dec. of Marilyn Shaw in Support of Notice of
3 Removal of Action under 28 U.S.C. Sections 1441(a) and 1446
4 [Diversity], page 2, paragraph 6.) However, a review of the
5 Department of Fair Employment and Housing administrative
6 charges filed against both ConocoPhillips Company and Sentinel
7 Transportation LLC (Ex. 1 to Mielke declaration. in support of
8 motion to remand filed concurrently herewith) shows that Abe
9 Castro, in the body of the Department of Fair Employment and
10 Housing administrative charges of discrimination against both
11 defendants ConocoPhillips Company and Sentinel Transportation
12 LLC and ConocoPhillips Company, is the first person listed
13 therein as having responsibility for the wrongful adverse
14 actions with the second person being listed as being Marilyn
15 Shaw. Castro is identified as being supervisor of deliveries
16 for ConocoPhillips. Such inclusion in the DFEH administrative
17 charge against the employer by naming the supervisory employee
18 in the body of the administrative complaint as being an
19 employee responsible for the wrongful conduct is sufficient
20 even if the employee's name is not listed in the caption part
21 of the charge and is not formally named as a responding party.
22 (See Saavedra v. Orange County Consol. Transp. Serv. Agency
23 (1992) 11 Cal.App.4th 824; Martin v. Fisher (1992) 11
24 Cal.App.4th 118.)

25 **c. An individual supervisorial/managerial employee is**
26 **liable as an individual for direct acts taken by him in**
27 **violation of California Government Code Section 12945.2 (CFRA)**
28

1 and Cal. Admin. Code, Title 2, Section 7297.7 (an implementing
2 administration provision of CFRA).

3 Plaintiff pleaded in the state court complaint that
4 defendant Abe Castro violated California Government Code
5 Section 12945.2 (CFRA) and Cal.Admin. Code, Title 2, Section
6 7297.7 (an implementing administrative regulation pertaining
7 to CFRA), as well as California Government Code Section
8 12940(i).

9 Defendants acknowledged in their notice of removal that
10 Cal. Admin. Code, Title 2, Section 7297.7 provides for
11 individual liability in a violation of retaliation under CFRA.
12 Cal. Admin. Code, Title 2, Section 7297.7 is entitled
13 "Retaliation", and states,

14 "In addition to the retaliation prohibited by Government
15 Code Section 12940, subdivision(f), and section 7287.8
16 of the regulations, it shall be an unlawful employment
17 practice for any **person** [emphasis added] to discharge,
18 fine, suspend, expel, punish, refuse to hire, or
19 otherwise discriminate against any individual, except as
20 otherwise permitted in this subchapter, because that
21 individual has:

18 (a) exercised his or her right to CFRA leave, and/or

19 (b) given information or testimony regarding his or her
20 CFRA leave, or another person's CFRA leave, in any
21 inquiry or proceeding related to any right guaranteed
22 under this subchapter."

22 Under California Government Code Section 12925(d), the
23 word "person" as used in Part 2.8 of the California Government
24 Code, which includes California Government Code Section
25 12945.2, is defined in pertinent part as "includes one or more
26 individuals. . ."

27 Plaintiff in his state court complaint alleges that
28

1 defendant Abe Castro participated in the decision to refuse to
2 hire him for the new company (Sentinel Transportation LLC)
3 which was taking over ConocoPhillips, prior to its taking over
4 ConocoPhillips, thereby effectively discharging him from
5 ConocoPhillips, and then after the takeover, still refused to
6 hire him thereafter (Garcia became a Sentinel Transportation
7 manager/supervisor in the takeover). (See state court
8 complaint, Ex. A to def. notice of removal, paragraphs 17-25,
9 31, and 36-37).

10 Therefore, under 2 CCR section 7297.7, Castro, as a
11 "person" under said administrative regulation, and pursuant to
12 the definition of "person" set forth in California Government
13 Code Section 12925(d), would be liable as an individual if the
14 allegations of retaliatory refusal to hire and discharge
15 plaintiff based on his taking CFRA leave are proven.

16 Defendants do not deny this interpretation of 2 CCR
17 section 7297.7, but instead argued in their notice of removal
18 that under the decision of Reno v. Baird, 18 Cal.4th 640
19 (1998) (a decision which addressed California Government Code
20 Section 12940(a)'s discrimination provision, not CFRA's
21 retaliatory provision [California Government Code Section
22 12945.2] and not any other retaliation provision of the
23 California Fair Employment and Housing Act), an individual
24 supervisory does not have any personal liability. There is no
25 precedent by any court which plaintiff has found which
26 addresses an individual supervisor's liability under CFRA. It
27 is unsettled law, and based on the standard that fraudulent
28

1 joinder cannot be proven when it is based on unsettled law or
2 there is any possibility of the plaintiff prevailing on his
3 legal theory, the Court should grant the motion to remand and
4 hold there is no fraudulent joinder of California resident
5 defendant Abe Castro.

6 Indeed, it should be noted, as well, that in Dudley v.
7 Dept. of Transportation, 90 Cal.App.4th 255 (2001), the Court
8 cited the CFRA retaliation provisions in Cal. Code Regs., tit.
9 2, Section 7297.7 as being in effect (the same CFRA regulation
10 which defendants concede would permit individual liability in
11 a CFRA retaliation matter, apart from any alleged invalidating
12 effect of such still-in-effect administrative regulation by
13 Reno v. Baird, supra). Moreover, in deciding how to interpret
14 Cal. Code Regs., tit. 2, Section 7297.7, the Court in Dudley
15 v. Dept. of Transportation, 90 Cal.App.4th 255 (2001),
16 indicated it would look to how the federal law under FMLA was
17 interpreted.

18 Interestingly, in this regard, the Court in Reno v.
19 Baird, supra, which was dealing with discrimination under
20 California Government Code Section 12940(a), not CFRA (Cal.
21 Gov't Code Section 12945.2), also used in its analysis the
22 counterpart federal law to California Government Code Section
23 12940(a)--Title VII--pertaining to which it noted that most
24 federal courts did not allow liability against individual
25 persons in Title VII, which it used to further bolster its
26 case that California Government Code Section 12940(a) didn't
27 permit a finding of liability against individual persons,

28

1 | either.

2 | However, in our case, the counterpart federal law (to
3 | CFRA) is not Title VII, but rather FMLA, and a number of the
4 | courts which have ruled on the issue of whether individual
5 | supervisors can be sued directly under FMLA have ruled that in
6 | fact they can. (See, e.g., Darby v. Bratch, 287 F.3d 673 (8th
7 | Cir. 2002) and cases cited therein; Morrow v. Putnam, 142
8 | F.Supp.2d 1271 (D. Nevada 2001).)

9 | Therefore, by analogy, an individual supervisor should
10 | be permitted to sue under CFRA for retaliatory conduct taken
11 | against an employee because he exercised CFRA rights, just
12 | like under federal law he could sue such individual supervisor
13 | under FMLA for retaliatory conduct taken against an employee
14 | because that employee had exercised FMLA rights.

15 | Moreover, there is no policy reason why a different
16 | result in terms of individual supervisory liability in
17 | retaliating against an employee for having exercised family
18 | and medical leave rights should result under CFRA law than
19 | results under FMLA law.

20 | Significantly, both the federal and state courts have
21 | ruled that in FEHA cases, an employee can sue an individual
22 | supervisor for retaliatory action taken against an employee
23 | because he had opposed discriminatory practices under FEHA.
24 | (See, e.g., Winarto v. Toshiba America Electronics Components,
25 | Inc., 274 F.3d 1276 (9th Cir. 2001); Walrath v. Sprinkel, 99
26 | Cal.App.4th 1237 (2002); Page v. Superior Court, 31 Cal.App.4th
27 | 1206 (1995).) There is no policy reason why the individual
28 |

1 should not also be allowed to sue the individual supervisor
2 who is retaliating against the employee for exercising CFRA
3 rights by taking a leave if he can be sued individually for
4 retaliating against the individual for taking adverse action
5 against the individual for opposing violation of his CFRA
6 rights or opposing other conduct made unlawful by Part 2.8
7 (the California Fair Employment and Housing Act).

8 In short, the controlling CFRA retaliation regulation, 2
9 CCR section 7297.7 (which remains in effect and the legality
10 of which has not been addressed by any court to plaintiff's
11 awareness), indicates that the individual supervisor can be
12 sued for retaliating against plaintiff for having taken a CFRA
13 protected leave, and thus defendant Castro is not a sham
14 defendant, and is not fraudulently joined as a defendant.

15 As noted previously above, on an issue of an alleged
16 fraudulent joinder of a defendant, all ambiguities in the
17 controlling state law must be resolved in favor of the non-
18 removing party." [Dodson v. Spiliada Maritime Corp. (5th Cir.
19 1992) 951 F.2d 40, 42-43—even "tenuous proposition" under
20 state law sufficient; unsettled state law issue must be
21 resolved in favor of the non-removing party].

22 As further noted previously above, fraudulent joinder is
23 not shown even if the Court concludes the cause of action is
24 likely to be dismissed against that defendant. As stated in
25 Dodson v. Spiliada Maritime Corp., id., 951 F.2d at 42-43, "We
26 do not decide whether the plaintiff will actually or even
27 probably prevail on the merits, but look only for a
28

1 possibility that he may do so." (See also, Coker v. Amoco Oil
2 Co. (11th Cir. 1983) 709 F.2d 1433.) In the instant case
3 there is a controlling administrative regulation which favors
4 plaintiff in this issue, no settled judicial precedent on
5 point, and a strong legal argument which favors the view
6 advanced by plaintiff for individual supervisorial liability
7 on a CFRA violation.

8 Accordingly, defendant Abe Castro is not a sham
9 defendant fraudulently joined as a defendant, and there is not
10 diversity jurisdiction, and the case should be remanded to
11 state court.

12 **2. There is also, at a minimum, a possibility that**
13 **defendant Dave Stannard is liable on the Second Cause of**
14 **Action for defamation.**

15 The defamatory statements which are the subject of this
16 case are set forth in paragraph 44 of the state court
17 complaint (Ex. A to def. notice of removal). The state court
18 complaint states in pertinent part in said paragraph that,
19 "Unbeknownst to plaintiff at the time, plaintiff's supervisor
20 at ConocoPhillips, defendant Dave Stannard, filled out in
21 writing an 'Employee Selection and Hiring Worksheet', on
22 plaintiff, and submitted it to defendant Sentinel
23 Transportation LLC, which plaintiff is informed and believes
24 was used in the decision on whether to let plaintiff continue
25 to work as a truck driver after Sentinel would become the
26 official employer. In this document, on a 10-point scale (1
27 equals poor and 10 equals outstanding), Stannard falsely rated

28

1 plaintiff as a "6" on "Disposition (Gets Along with fellow
2 workers)", a "7" on "Attitude", a "7" on "Productivity", a
3 "7" on "Work Ethic", and gave him no rating at all on "Safety"
4 despite plaintiff's excellent record at ConocoPhillips and its
5 predecessor companies (in fact Stannard had played a role in
6 hiring plaintiff in 1997). However, Stannard was now hostile
7 toward plaintiff, based on plaintiff's having repeatedly (and
8 legitimately) protested safety issues, including in connection
9 with Stannard's conduct. Significantly, on the October 16,
10 2003 Employee Selection and Hiring Worksheet, Stannard checked
11 the "No" box on the "Hiring Recommendation" line, using the
12 aforesaid false negative ratings he put down on said form as a
13 purported justification for the "No" rating on "Hiring
14 Recommendation". The checking of the box "No" on the "Hiring
15 Recommendation" indicated that Stannard did not believe that
16 plaintiff would perform well or be a good employee for
17 defendant Sentinel Transportation LLC based on various lawful
18 factors, including, without limitation, the categories he had
19 falsely graded plaintiff on in the same form."

20 A true and correct copy of the "Employee Selection and
21 Hiring Worksheet" document referred to in the above paragraph
22 is attached as Exhibit 3 to Declaration of Arthur Mielke in
23 Support of Motion to Remand Case to Superior Court being filed
24 concurrently herewith.

25 The state court complaint indicated that the defamatory
26 statements were defamatory per se and otherwise defamatory,
27 including without limitation in that they accused plaintiff of
28

1 incompetence, problems with his disposition, attitude,
2 productivity and work ethic, and to the point of not
3 recommending him to be an employee; accused plaintiff of
4 having possible reprehensible personal characteristics or
5 behavior; adversely affected plaintiff's reputation;
6 denigrated his standing and the perception of him as a
7 valuable employee; made him appear to be not desirable as a
8 worker and not suitable for hiring by another employer, and in
9 fact served as a basis for not having him continue on in work,
10 and not being hired by or obtaining employment with others
11 (including, without limitation, Sentinel Transportation LLC);
12 and prejudiced plaintiff, imputed lack of ability of plaintiff
13 in his trade, profession or business, and imputed inability to
14 perform in a satisfactory manner in discharge of his duties
15 and employment." (State Court Complaint, attached as Ex. A to
16 def. notice of removal, paragraph 46.)

17 Plaintiff also pleaded that the defamatory conduct had a
18 number of adverse effects on him, including, causing plaintiff
19 not to be selected and/or being hired by the takeover company
20 (Sentinel Transportation LLC) and/or others. (State Court
21 Complaint, attached as Ex. A to def. notice of removal,
22 paragraphs 46 and 47.)

23 **a. The defamatory statements are not time-barred.**

24 Defendant alleged in its notice of removal that the
25 alleged defamatory statements by Dave Stannard were time-
26 barred.

27 The statute of limitations for defamation is one year.

28

1 This one year does not start running until the plaintiff knew
2 or should have known all material facts essential to show the
3 elements of his cause of action. (See Manguso v. Oceanside
4 Unified School District, 88 Cal.App.3d 725 (1979).)

5 In paragraph 51 of the state court complaint (Ex. A to
6 def. notice of removal), plaintiff pleaded, "Plaintiff did not
7 discover that any of the aforesaid false
8 statements/misrepresentations had been made until on or about
9 August 12 or 13, 2004, long after he was terminated. He
10 discovered them when a governmental agency was investigating
11 an administrative complaint he had filed pertaining to said
12 misrepresentations. Prior to this time (on or about August 12
13 or 13, 2004), plaintiff had no knowledge of any such document,
14 or that any such false statements/misrepresentations had been
15 made."

16 The Declaration of Arthur Mielke in Support of Motion to
17 Remand Case to Superior Court, paragraphs 2-5, supports the
18 fact that plaintiff did not know nor should have known all
19 material facts essential to show the elements of his
20 defamation cause of action until August 2004 (the state court
21 complaint was filed in November 2004). In this regard,
22 plaintiff Mielke did not first discover the defamatory
23 statements until within one year of the date the lawsuit was
24 filed when he saw for the first time the defamatory written
25 statement of defendant Stannard when a governmental agency
26 which had been investigating his charge gave him a copy of it.
27 Prior to that time he did not know of its existence or its
28

1 contents, and did not know Dave Stannard had made any of the
2 statements and representations contained therein. (See
3 Miellke declaration and paragraph 51 of state court
4 complaint.)

5 **b. The defamatory statements are not opinion, and**
6 **accordingly are actionable.**

7 Defendants also took the position in their notice of
8 removal that the alleged defamatory statements in the state
9 court complaint are allegedly not actionable as a matter of
10 law because they are "non-actionable opinion." They point to
11 the case of Jensen v. Hewlett-Packard Company (1993) 14
12 Cal.App.4th 958, in which the Court characterized certain
13 statements made in the context of a performance evaluation as
14 non-actionable opinion rather than false statements of fact.

15 In Jensen, id., the statements in the performance
16 evaluation were published only internally by a Hewlett-Packard
17 supervisor to other Hewlett-Packard management personnel, and
18 there was no evidence the statements had caused any adverse
19 personnel action against the plaintiff. The Court in Jensen
20 noted that in determining whether the published statements
21 were non-actionable opinions or provably false factual
22 assertions, the communication needed to be looked at "in light
23 of the context in which it was published." Id. at 970. The
24 Court went on to state, "The communication's meaning must be
25 considered in reference to relevant factors, such as the
26 occasion of the utterance, the persons addressed, the purpose
27 to be served, and 'all of the circumstances attending the

28

1 publication.'" Id., at 970.

2 In our case, what is involved is not an internal
3 performance evaluation, without any adverse personnel action
4 caused by it. What is involved is an "Employee Selection and
5 Hiring Worksheet" which was used by the takeover company
6 (relying on the supervisor of the company being taken over) to
7 determine who would continue to be employed as a gasoline
8 tanker driver out of the Richmond terminal after the takeover
9 (the ultimate adverse personnel action of losing one's
10 employment). (See Ex. 3 to Mielke declaration.)

11 Moreover, even in an internal performance evaluation
12 case (which our case was not), the Court in Jensen indicated
13 that if it had been suggested in the evaluation referred to
14 therein that the plaintiff therein had lacked honesty or had
15 lacked inherent competence, qualification, capability or
16 fitness to do his job, or that he had reprehensible personal
17 characteristics, it would have reached a different result.
18 (Id., at 970-971.)

19 In the defamatory writing in our case, defendant
20 Stannard combined his low ratings of plaintiff in various
21 areas with checking the box "No" under "Hiring
22 Recommendation", strongly suggesting that plaintiff lacked
23 inherent competence, qualification, capability or fitness to
24 do his job (in that he was essentially being deemed as not to
25 be qualified to be hired by the new takeover employer based on
26 his past performance). Stannard was falsely communicating via
27 his ratings and his checking the "No" box on "Hiring
28

1 Recommendation" that plaintiff had not met a minimum level of
2 qualification, capability, fitness, or inherent competence to
3 be hired for the job by the takeover company. Accordingly,
4 even the Jensen test for defamation regarding internal
5 performance evaluations would be met. (See Ex. 3 to Mielke
6 declaration; also see paragraphs 44-46 of state court
7 complaint, Ex. A to def. notice of removal, where
8 "incompetence" and reprehensible personal characteristics or
9 behavior" are directly referred to.) In Stratman v. Brent,
10 291 Ill.App.3d 123, 683 N.E.2d 951 (1997), a statement to a
11 prospective employer by a police chief which included a
12 statement that the defendant would not rehire the plaintiff
13 was held, along with other statements, to have been clearly
14 meant to have been a comment on the plaintiff's ability to
15 perform in future positions and therefore actionable in a
16 defamation action.

17 Also, the failure by defendant Stannard in our case to
18 give plaintiff any rating for safety on the "Employee
19 Selection and Hiring Worksheet" form indicated there was a
20 problem with plaintiff's adherence to safety on the job
21 (safety being an absolute prerequisite for a driver of a
22 gasoline tanker truck). "Safety" was a factual assertion, not
23 an opinion assertion about a personality characteristic. On
24 the Employee Selection and Hiring Worksheet form (Ex. 3 to
25 Mielke declaration), "Safety" was defined as "Incidents i.e.,
26 CVA's, injuries/mixes & spills." It was defined in terms of
27 being measured based on factual incidents, not opinion.

28

1 In Agarwal v. Johnson, 25 Cal.3d 932 (1979), the
2 California Supreme Court affirmed a verdict for a plaintiff
3 against his employer and certain supervisory employees for
4 defamation and intentional infliction of emotional distress
5 where the false statements were statements by his supervisor
6 justifying his termination that he was terminated for "lack of
7 job knowledge and cooperation". In our case, plaintiff lost
8 his employment based on negative statements by his supervisor
9 pertaining to various matters including "Productivity
10 (Stoptimes, gallons/hour, loads/shift)", ("Safety (Incidents
11 i.e., CVA's, injuries/mixes & spills)", "Attitude", "Work
12 Ethic", and "Disposition (Gets along with fellow workers)".
13 These negative statements combined with the checking of the
14 "No" box as to "Hiring Recommendation", which caused plaintiff
15 to lose and be denied employment, clearly go beyond the
16 limited Jensen exception made for opinions not causing any
17 adverse personnel action in a performance evaluation context.
18 The totality of the Employee Selection and Hiring Worksheet
19 filled out by defendant Stannard indicated that plaintiff
20 lacked inherent competence, qualification, capability or
21 fitness to do his job, and/or that he had reprehensible
22 personal characteristics, and that he should not be hired by
23 the new employer based thereon. Defendant Stannard has
24 committed actionable defamation.

25 **IV. CONCLUSION**

26 For all the aforesaid reasons, this Court should grant
27 the motion to remand, and order this case remanded to the
28

1 Superior Court of California, County of Contra Costa.

2 This Court does not have subject matter jurisdiction of
3 this case, since there is no diversity of citizenship under
4 this case. Both defendants Castro and Stannard, as well as
5 plaintiff Mielke, were residents of California at the time the
6 state court was filed.

7 Unlike defendants argued in their notice of removal,
8 defendants Abe Castro and Dave Stannard were not fraudulently
9 joined as defendants in the state court complaint, and are not
10 sham defendants.

11 DATED: April 4, 2005.

12 LOUIS A. HIGHMAN, ESQ.
13 LAWRENCE BALL, ESQ.
HIGHMAN, HIGHMAN & BALL

14
15 By /s/ Louis A. Highman
Attorneys for Plaintiff
16 Arthur Mielke
17
18
19
20
21
22
23
24
25
26
27
28